SECOND SECTION

CASE OF ANĐELKOVIĆ v. SERBIA

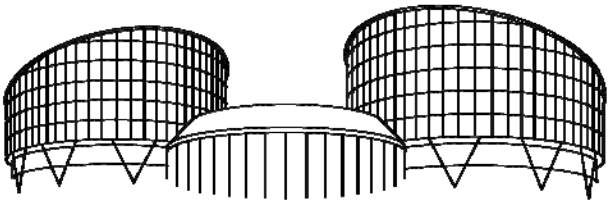
(Application no. 1401/08)

JUDGMENT

STRASBOURG

9 April 2013

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

In the case of Anđelković v. Serbia,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Guido Raimondi, *President,*
Peer Lorenzen,
Dragoljub Popović,
András Sajó,
Nebojša Vučinić,
Paulo Pinto de Albuquerque,
Helen Keller, *judges,*

and Stanley Naismith, *Section Registrar*,

Having deliberated in private on 19 March 2013,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 1401/08) against the Republic of Serbia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Serbian national, Mr Milomir Anđelković ("the applicant"), on 22 November 2007.

2. The applicant was represented by Mr M. Milosavljević, a lawyer practising in Bor. The Serbian Government ("the Government") were represented by their Agent, Mr S. Carić.

3. The applicant claimed that the final judgment rendered in his case, which had partially overturned a judgment in his favour, had been arbitrary.

4. On 26 September 2011 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1958 and lives in Bor.

6. On 26 October 2004 the applicant filed a civil claim against his employer, company Z, seeking the payment of outstanding holiday pay (*regres za korišćenje*

godišnjeg odmora) due for 2002 and 2003, the difference between the salary he had received and the minimum salary payable under collective agreements in force at the company for the period from October 2001 to May 2004, statutory interest and legal costs.

7. Following a remittal in 2005, on 15 March 2006 the Bor Municipal Court (*Opštinski sud*) ruled in favour of the applicant. As regards the outstanding holiday pay, the court observed that company Z had not paid the holiday pay due for 2002 and 2003 to any of its employees, as its alleged parent company had been encountering financial difficulties. The court, however, found these facts to be irrelevant to the outcome of the applicant's claim, as according to the Labour Act and enterprise bargaining agreements in force at the company he had been entitled to holiday pay regardless of the level of his employer's profits.

8. On 3 September 2007 the Zaječar District Court (*Okružni sud*) reversed the part of the Municipal Court's judgment which concerned holiday pay and legal costs, while upholding the remainder. The District Court based its refusal on the finding, disregarding applicable employment law, that company Z had not paid outstanding holiday pay to any of its employees and therefore that "to accept the applicant's claim would mean that the applicant would be treated more favourably than his colleagues, who had not received payment of outstanding holiday pay from their employer either". No further recourse against this judgment was available to the applicant.

9. It would appear that between 2004 and 2009 a number of the applicant's colleagues lodged the same or similar claims to those of the applicant with the Municipal Court.

10. On 28 April and 2 June 2009 the Municipal Court rejected the claims of the applicant's colleagues for the same reasons as the District Court had in the applicant's case. However, the Belgrade Court of Appeal, which, following reforms to the judicial system had become the competent appeal court, overturned both judgments on 29 April and 30 June 2010, respectively. In so doing, the appeal court found that the claimants had been entitled to their outstanding holiday pay by applicable domestic law (see paragraphs 10-13 below), finding that the reasons for judgment given by the Municipal Court in their cases were irrelevant and that it had erred in law in rendering the judgments.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Labour Act 2001 (*Zakon o radu*; published in the Official Gazette of the Republic of Serbia "OG RS" nos. 70/01 and 73/01)

11. Article 90 paragraph 3 stipulated that collective bargaining agreements, labour regulations or employment contracts may provide for pay or benefits to employees over and above the rights set out in the Act.

B. General Collective Bargaining Agreement 2001 (*Opšti kolektivni ugovor*; published in the OG RS nos. 22/97, 21/98, 53/99, 12/00 and 31/01 – "the 2001 Agreement")

12. Pursuant to clause 30a(1.2), an employee shall be entitled to additional pay, including to holiday pay, which shall amount to a monthly average wage in the relevant industrial sector. Holiday pay shall be paid in full to employees who are entitled to 18

days of annual leave, and shall be reduced proportionally if the employee is entitled to fewer days of annual leave.

C. Special Collective Bargaining Agreement for metal industry workers (*Poseban (granski) kolektivni ugovor metalaca Srbije*, published in the OG RS nos. 50/95, 9/96, 44/97, 9/00 and 49/01)

13. The text of clause 4(2) of this agreement corresponds to clause 30 of the 2001 Agreement.

D. Enterprise Bargaining Agreement concluded between the trade union and the director of company Z (*Pojedinačni kolektivni ugovor između Organizacije sindikata i direktora privrednog društva Z.*, no. 01-83/98 of 22 October 1998)

14. The text of clause 116(1) of this agreement corresponds to clause 30 of the 2001 Agreement. Additionally, clause 116(4) provides that in case of its financial inability to pay holiday pay as a lump sum, the employer may pay it in several instalments.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

15. The applicant complained that the court of final instance had rejected his claim for outstanding holiday pay for reasons which had not been correct in law, in breach of Article 6 of the Convention, which, in so far as relevant, reads as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

A. Admissibility

16. The Government maintained that the applicant had failed to pursue his application with reasonable expedition (relying upon *Kemevuako v. the Netherlands* (dec.), no. 65938/09, 1 June 2010). Whilst the Court appeared to consider that the application had been lodged on 22 November 2007, the Government, however, noted that the applicant had failed to follow the Court's instruction to submit an application form by 28 October 2011, justifying his delay on the belated delivery of the Court's letter of 4 October 2011 containing that instruction. The Government maintained that the significant delay of more than two years between the initial letter (22 November 2007) and the submission of the completed application form (by 28 October 2011 at the earliest) meant that the initial letter should cease to be regarded as the introduction of the application and that only the date on which the completed application had been lodged should be relevant. The final decision in the present case being the judgment of 3 September 2007, the Government concluded that the application had been introduced outside the six-month time-limit set down by Article 35 § 1 of the Convention.

17. The applicant's observations, following the communication of his case to the Government, were submitted after the expiration of the time-limit set by the Court. The President of the Chamber therefore decided, pursuant to Rule 38 § 1 of the Rules of

Court, that they should not be included in the case file for the Court's consideration (see also paragraph 20 of the Practice Direction on Written Pleadings).

18. In accordance with the established practice of the Convention organs, the Court normally considers the date of the introduction of an application to be the date of the first communication indicating an intention to lodge an application and giving some indication as to the nature of the application. Such first communication will interrupt the running of the six-month period (see *Arslan v. Turkey* (dec.), no. 36747/02, 21 November 2002, ECHR 2002-X (extracts), and *Růžičková v. the Czech Republic* (dec.), no. 15630/05, 16 September 2008).

19. Turning to the present case, the Court observes that the Government have misinterpreted the facts. The present application was introduced on 22 November 2007 on a duly completed application form, which contained a full outline of the applicant's case. As regards the Government's objection, the Court observes that, by its letter of 4 October 2011, the Registry gave notice of the present application to the Government. In a corresponding letter of the same date, the applicant was notified by the Registry that, pursuant to Rule 36 §§ 2 and 4 of the Rules of Court, he was required to appoint an "advocate" at that stage of the proceedings and, in that regard, to complete and return an enclosed authority form to the Court by 28 October 2011. The applicant did so on 11 November 2011, claiming that the delivery of the Registry's letter of 4 October 2011 had been delayed. In addition, he submitted another copy of the application form with the words "already served on the Court on 22 November 2007" noted under each relevant field. The Court emphasises that the applicant's further submission of additional documents, including another copy of the application form, did not change the original date of introduction. Since the final decision in the present case was adopted on 3 September 2007, and the application was lodged with the Court on 22 November 2007, this objection by the Government must be dismissed.

20. The Court notes, moreover, that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It is likewise not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

21. The Government contended, based on a two-pronged argument, that the facts of the present case clearly disclosed no violation of Article 6 § 1 of the Convention.

22. Firstly, they submitted that the case-law of the Zaječar District Court on the issue in question had been consistent, although, admittedly, it had diverged from the practice of Belgrade Court of Appeal. Nevertheless, conflicting judgments of these two domestic courts on the same legal matter could not be characterised in the present case as "profound and long-standing differences" (making reference to *Tudor Tudor v. Romania*, no. 21911/03, 24 March 2009).

23. Secondly, the Government maintained that the status of the applicant was "almost analogous" to that of the applicant in the case of *Karuna v. Ukraine* (dec), no. 43788/05, 2 April 2007. In view of the Court's finding in the *Karuna* case that it is not its function to deal with errors of fact or law allegedly committed by a national court, the Government invited the Court to likewise reject the present application as manifestly ill-founded.

24. The Court reiterates at the outset that it is not its task to take the place of the domestic courts. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation (see, among many authorities, *Brualla Gómez de la Torre v. Spain*, 19 December 1997, § 31, *Reports of Judgments and*

Decisions 1997-VIII). That being so, the Court will not question the interpretation of domestic law by the national courts, save in the event of evident arbitrariness (see, *mutatis mutandis*, *Ādamsons v. Latvia*, no. 3669/03, § 118, 24 June 2008), in other words, when it observes that the domestic courts have applied the law in a particular case manifestly erroneously or so as to reach arbitrary conclusions and/or a denial of justice (see, *mutatis mutandis*, *Farbers and Harlanova v. Latvia* (dec.), no 57313/00, 6 September 2001, and, albeit in the context of Article 1 of Protocol No. 1, *Beyeler v. Italy* [GC], no. 33202/96, § 108, ECHR 2000-I).

25. Turning to the present case, the Court finds Article 6 § 1 applicable, given that the domestic courts were called upon to determine a dispute concerning a right to outstanding holiday pay, which can be considered to be a civil right which the applicant could, on arguable grounds, claim under Serbian law.

26. Further, even accepting the Government's assertion about the claim's rejection being in line with the consistent practice of the District Court in such matters, the Court considers that this is not of relevance to the case, as the subject of the Court's examination in the present case is not the possible legal uncertainty stemming from the divergent interpretation of domestic law by domestic courts; rather, the fundamental issue in the present case, which distinguishes it, *inter alia*, from many of the other cases before this Court, including *Karuna*, is the element of arbitrariness disclosed in the appellate judgment complained of.

27. Specifically, the Court observes that Serbian labour law governing holiday pay is not vague and ambiguous, but clearly provides for the instances in which employees are entitled to such additional payments (see paragraphs 11-14). The first-instance court established certain facts and found that the applicant had a legal entitlement to the holiday pay claimed. The District Court overturned that judgment on appeal and rejected the applicant's claim without even making reference to the facts and the labour law as presented by the first-instance court. Nor did it refer in the impugned judgment to what the law was, how it should have been applied to the applicant's case or whether the conditions stipulated in the applicable collective and enterprise bargaining agreements had been met in the applicant's case. The District Court, while disregarding applicable employment law, rejected the applicant's claim on the sole ground that "to accept the applicant's claim would mean that the applicant would be treated more favourably than his colleagues, who had not received payment of outstanding holiday pay from their employer either" (see paragraph 8 above). This reasoning had no legal foundation (see, *mutatis mutandis*, *De Moor v. Belgium*, 23 June 1994, § 55, Series A no. 292-A) and was based on what appears to be an abstract assertion quite outside of any reasonable judicial discretion. Furthermore, a connection between the established facts, the applicable law and the outcome of the proceedings is wholly absent from the impugned judgment. The Court therefore finds that such an arbitrary District Court's ruling has amounted to a denial of justice in the applicant's case (see, albeit in the context of assessment of evidence, *Khamidov v. Russia*, no. 72118/01, § 175, 15 November 2007, and contrast to *Camilleri v. Malta* (dec.), no. 51760/99, 16 March 2000).

28. Lastly, the Court observes that no further recourse against this appellate judgment was available to the applicant at the material time.

29. In these circumstances, the Court considers that the District Court did not give the applicant's case a fair hearing and finds accordingly that there has been a violation of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

30. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

31. The applicant claimed 23,539 dinars (RSD; approximately 210 euros (EUR)) for non-pecuniary and pecuniary damage suffered, and RSD 14,541 (approximately EUR 130) for costs and expenses incurred in connection with the proceedings before the Court.

32. The Government submitted that these claims were belated.

33. The Court notes that the applicant's just satisfaction claims were set out on the application form but were only resubmitted on 14 May 2012, almost two months after the expiry of the allotted time-limit for so doing. This time-limit was imposed upon the Court's transmission of the Government's initial observations. The applicant has therefore failed to comply with Rule 60 §§ 2 and 3 of the Rules of Court and paragraph 5 of the Practice Direction on Just Satisfaction Claims, which, in so far as relevant, provides that the Court "will also reject claims set out on the application form but not resubmitted at the appropriate stage of the proceedings and claims lodged out of time". The applicant's just satisfaction claims must therefore be dismissed.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Dismisses* the applicant's claims for just satisfaction.

Done in English, and notified in writing on 9 April 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith	Guido Raimondi
Registrar	President